MARJORIE N. UNDERWOOD

IBLA 80-341 Decided September 16, 1981

Appeal from decisions of the Nevada State Office, Bureau of Land Management, rejecting Indian allotment applications N-25335 and N-25338.

Decision in N-25335 affirmed; N-25338 remanded.

1. Applications and Entries: Generally--Recreation and Public Purposes Act

An Indian allotment application is properly rejected where it requests lands which are not available for entry because they have previously been noted on BLM plats under a recreational and public purposes classification pursuant to 43 U.S.C. § 869 (1976).

APPEARANCES: Marjorie N. Underwood, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal is taken from a decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting Indian allotment application N-25335. Although N-25338 also appears to have been rejected, the file contains no copy of any BLM decision disposing of the application. The appeal is addressed to both applications, filed for public lands in Clark County, Nevada, pursuant to section 4, Act of February 8, 1887, as amended, 25 U.S.C. § 334 (1976).

The applications were filed on July 13, 1979, seeking the NW 1/4 and the SE 1/4 respectively of sec., 10 T. 21 S., R. 59 E., Mount Diablo meridian. The applications indicated that the applicant had neither occupied the lands nor placed improvements thereon. Each application referred to a posted notice, a copy of which was attached to the application. The notices showed that they had been recorded in Clark County and listed a receiving number and book of recordation.

BLM rejected N-25335 explaining that the land requested was within an area that had been classified for use under the Recreation and Public Purposes Act of June 14, 1926 (RPP), as amended, 43 U.S.C. 869 (1976), which classification segregated it from other forms of appropriation. The plat maps included in the files bear the following notation within the NW 1/4 of section 10:

N-25335 IA Apln
N-1114 Rec & PP ISE N-1114 Rec & PP CI Segr 7/18/1968.

The appellant's statement of reasons reads as follows:

This claim was not filed under the 4th section of the act of February 8, 1887 only, but also under 43 U.S. Code 190, (act of July 4, 1884 C 180 Sec. 1 Stat. 96) 43 U.S. Code (act of March 3, 1875 C 131 and 15, 18 Stat. 420) section 4 of the act of February 8, 1887 (24 Stat. L 388) as amended by the act of February 28, 1891 (26 Stat. L 794) and the act of June 25, 1910 (36 Stat. L 855 Et. Seg. [sic.] where applicable and in pari materia with my tribes treaty committments with the United States of America). Said rights being reserved to me under the Indian Citizenship Act because of my Indian Descent under the act of June 2, 1924 (43 Stat. 253). See 8 U.S.C. 1401 -- 25 U.S.C. -- 332, 334, 345, 346, 190, 337, 43 U.S.C. 190, 189, ect. [sic.] It seems most of them are being overlooked. They are all recorded on this claim. See -- Choats V. Trapp 224 U.S. 413 (1912). [1]/ See-U.S.C.A. Const. Amend. 5

The same arguments were presented and answered in Samuel Lee Gifford, 53 IBLA 23 (1981). Item 10 of the application form, after asking the applicant to indicate whether there was a claim of bona fide settlement states: "(Public land withdrawn by Executive Orders 6910 and 6964 of November 26, 1934, and February 5, 1935, respectively, is not subject to settlement under section 4 of the General Allotment Act of February 8, 1887, as amended, until classified as suitable.)"

1/ The Indian allotment case reported at 224 U.S. 413 is Heckman v. United States.

There is no information or credible evidence to show that the applicant has, in fact, physically settled upon the lands applied for, and particularly, that any alleged settlement was initiated prior to the first general order of withdrawal, Exec. Order No. 6910, November 26, 1934, supra. It is well established that no rights of Indians are violated by the withdrawal of public lands from settlement and the requirement that such lands be classified pursuant to section 7, Taylor Grazing Act, 43 U.S.C. § 315(f) (1976), before the public lands can be allotted to an Indian under section 4 of the General Allotment Act, supra. Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); Finch v. United States 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968). Nor is there a violation of any rights of the Indian if an allotment application is denied where the land is not classified for allotment. Finch v. United States, supra. Also, regulation 43 CFR 2530.0-3(c) provides that public land withdrawn by Exec. Order No. 6910, supra, and within a grazing district established under section 1 of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), is not subject to settlement under section 4 of the General Allotment Act, supra, until such settlement has been authorized by classification. All public land in Clark County, Nevada, was placed in Nevada Grazing District No. 5, by Departmental Order of November 3, 1936, 1 FR 1748 (Nov. 7, 1936).

[1] According to the record, the Recreation and Public Purposes classification was posted to the BLM plats on July 18, 1968, 11 years before appellant herein filed allotment application N-25335. The language of 43 U.S.C. § 869 (1976) is not self executing and in the absence of proper authority to restore the land, an RPP classification continues to remove the land from appropriation under the public land laws. Delmer McLean, 40 IBLA 34 (1979). R. C. Buch, 75 I.D. 140 (1968), sustained in Buch v. Morton, 449 F.2d 600, 607 (9th Cir. 1971). See also Elko County Board of Supervisors, 29 IBLA 220 (1977). We conclude that BLM properly rejected application N-25335.

The file in N-25338 does not contain a copy of a BLM decision rejecting this application. It contains a letter by BLM, dated January 2, 1980, requesting appellant to file a certificate, pursuant to 43 CFR 2531.1(b), showing that she is an Indian before her application could be further processed. The file does not show whether appellant submitted the required certificate. In the application blank space specifically requesting the number of the certificate issued by the Bureau of Indian Affairs appellant wrote: "8 U.S.C. 1401 U.S.C.A. Const. Amend. 5." This response does not comport with the requirements. Neither the cited statute, which refers to United States citizenship, nor the United States Constitution is in issue here. See Wanda Lois Lee McKinney, 53 IBLA 279 (1981). While it may be that BLM issued a decision rejecting the application because of appellant's failure to submit the required certificate, we cannot review BLM's action where no copy of the decision has been included in the file. Therefore, N-25338 will be remanded for additional appropriate processing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision in N-25335 is affirmed, and the case involving N-25338 is remanded for completion and further processing.

Anne Poindexter Lewis
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge.